

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 23 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0397
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MICHAEL JAMES POTTER,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092016

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes

Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 After a jury trial, appellant Michael Potter was convicted of theft of a means of transportation, third-degree burglary, and possession of burglary tools. On appeal he contends the trial court erred in denying his motion to continue his trial to give him an opportunity to retain private counsel. We affirm.

¶2 On the morning of trial, Potter moved to continue the trial, claiming he wished to retain Eric Larsen to represent him. His appointed counsel told the court Potter had spoken to Larsen and that Potter believed he was able to retain him. The court asked Potter why he had waited so long to bring up the matter, and Potter responded, “I couldn’t get ahold of my immediate family.” Adding Larsen wanted a total retainer of \$4,000 but that he only had \$2,500, Potter admitted he was unable to retain Larsen at that point. The court denied the motion, stating, “[O]bviously the Court has no way of knowing if you will ever be able to retain him or whether he will ever be the attorney because he isn’t now and this trial is set for trial now, today.” The court added, “[W]e have a jury outside of the doors ready to go and this is the first the Court has heard anything of this nature. And as far as the Court knows, Mr. Larsen is not now counsel and may never be.” The court asked appointed counsel whether he was ready to proceed and “represent the defendant fully,” and counsel responded that he was. Denying the motion, the court proceeded with the trial.

¶3 Potter contends the trial court’s denial of his request for a continuance under these circumstances “violated his constitutional right to counsel and was structural error.” Relying to a large degree on *United States v. Gonzalez-Lopez*, 548 U.S. 140

(2006), he asserts he has a constitutional right to counsel of his choice and that the violation of such a right “unquestionably qualifies as structural error.”

¶4 A trial court has “wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.” *Gonzalez-Lopez*, 548 U.S. at 152 (citation omitted). Although the right to counsel of one’s choosing is implicated in the Sixth Amendment, that “right is not absolute and may be forfeited” if the defendant is dilatory in requesting a substitution of counsel or the request impedes the processing of criminal cases in an orderly fashion. *State v. Miller*, 111 Ariz. 321, 322, 529 P.2d 220, 221 (1974). Thus, even when the motion for a continuance is based on a request to permit retained counsel to substitute for appointed counsel, an appellate court will not disturb the trial court’s ruling absent a clear abuse of discretion. *Id.* See also *State v. Aragon*, 221 Ariz. 88, ¶ 4, 210 P.3d 1259, 1261 (App. 2009) (“A trial court has ‘wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.’”), quoting *Gonzalez-Lopez*, 548 U.S. at 152.

¶5 “Whether an accused’s constitutional rights are violated by the denial of a request for a continuance depends on the circumstances present in the particular case.” *State v. Hein*, 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983). The following factors are relevant to that inquiry:

whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

Id. Potter concedes that the quality of representation he received is not relevant to our inquiry. *See Gonzalez-Lopez*, 548 U.S. at 148.

¶6 Based on the record before us, we cannot say the trial court abused its discretion. First, Potter did not raise this matter until the first day of trial, just before jury selection was scheduled to begin. He had been represented by one court-appointed attorney four months before trial and another shortly thereafter and had been out of custody for one week before the trial began. In this respect, this case is distinguishable from *Aragon*. Trial in that case had been set for March 11, 2008; on March 5, appointed counsel asked for a continuance so that private counsel Aragon wished to retain could file a notice of appearance and have time to prepare for trial. 221 Ariz. 88, ¶ 2, 210 P.3d at 1260. The retained attorney appeared at a status conference two days later and asked the court whether it would consider allowing him to be substituted as Aragon’s counsel. *Id.* ¶3.

¶7 Additionally, Potter had not yet retained Larsen when he asked the court to continue the trial, nor could he assure the court that he would be able to secure the funds necessary to retain Larsen within a reasonable time, prompting the trial court to comment Larsen was not Potter’s attorney “and may never be.” Thus, this case is unlike *Gonzalez-Lopez*, *Aragon*, or *Hein*, in which private counsel had apparently already been retained. *See Gonzalez-Lopez*, 548 U.S. at 142; *Hein*, 138 Ariz. at 368, 674 P.2d at 1366; *Aragon*, 221 Ariz. 88, ¶¶ 2-3, 210 P.3d at 1260-61.

¶8 Finally, we noted in *Aragon* that the trial court had denied the motion for a continuance relying in large part on the expiration of the time limits under Rule 8, Ariz.

R. Crim. P. *Aragon*, 221 Ariz. 88, ¶ 7, 210 P.3d at 1262. We found the court had erred because the time would have been excludable under Rule 8.4(a) as occasioned by the defendant. *Id.* Although the court here inquired about the Rule 8 time limit, which was not in danger of expiring for a couple of weeks, the time limit was not the basis for its ruling.

¶9 Finding no abuse of discretion, we affirm the convictions and the sentences imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge